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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
White v. GTE Corporation	)	WT Docket No. 00-164
	)	
Petition for Declaratory Ruling on Issues Contained in Count I of "White vs. GTE," United States District Court for the Middle District of Florida, Case No. 97-1859-CIV-T-26C	)	

To: The Commission

COMMENTS OF ALLOY LLC

Alloy LLC ("Alloy"), on behalf of its wireless subsidiaries and affiliates, by its attorneys, hereby submits these comments in the instant proceeding, *Public Notice*, DA 00-2083.[1] For the reasons stated herein, the Commission should reject the positions advocated in the Petition for Declaratory Ruling filed on February 2, 2000, and should declare that the challenged rate-related matters are not *per se* unlawful and that state regulation of such practices is preempted by federal law.

DISCUSSION

The plaintiffs in the GTE class action ("Petitioners") seek a ruling from the Commission that certain CMRS rate plans are unreasonable under Section 201(b) of the Communications Act of 1934 (the "Act"), and that states are not preempted from regulating such rate plans by Section 332(c)(3)

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[1] "Commission Seeks Comment on Petition for Declaratory Ruling Regarding Whether Certain CMRS Practices Violate the Communications Act" (released September 20, 2000). The Petition for Declaratory Ruling ("Petition") was filed by the Plaintiffs in the *White v. GTE* class action lawsuit. *White v. GTE Corp.*, No. 97-1859-CIV-T-26C (M.D. Fla filed Oct. 29, 1998) ("GTE class action").

of the Act. Petitioners specifically object to the charging of customers in whole minute increments where such charges (1) are measured from the time the "send" button is pushed; (2) include time for unanswered calls; and (3) are rounded up to the next minute.[2] The Commission previously has reviewed and approved similar, and in some instances, identical methods of calculating rates, and has found that states are preempted from regulating such rate decisions.[3] As the Commission has recognized, however, CMRS carriers continue to be plagued by numerous lawsuits concerning their rate plans.[4] Alloy thus urges the Commission to declare that such industry practices are not unlawful under Section 201(b) and that state attempts to regulate such CMRS rate practices are preempted by Section 332(c)(3).

I. GTE'S CHALLENGED RATE PLANS ARE NOT UNLAWFUL UNDER SECTION 201(b)

Petitioners challenge the reasonableness of GTE's rate plans under Section 201(b) of the Act,[5] which states that "[a]ll charges, practices, classifications, and regulations for and in connection

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[2] *See* Petition at 2. The Commission's *Public Notice* also seeks comment on the practice of "charging customers for dead time." Although this practice is not defined in the Petition, Alloy interprets dead time as the time between when the "send" button is pushed and the call connects, or the time between when the "end" button is pushed and charging for the call stops. As such, the practice of charging for "dead time" is addressed in Alloy's discussion of measuring calls from the time the "send" button is pushed and rounding up calls to the next minute, and is not addressed separately.

[3] Southwestern Bell Mobile Systems, Inc., Petition for Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, FCC 99-365, *Memorandum Opinion and Order*, 14 F.C.C.R. 19898 (1999) ("*SBMS Order*").

[4] *See SBMS Order*, 14 F.C.C.R. at 19899-900.

[5] *See* Petition at 5. Although Petitioners claim that they are challenging only GTE's contract practices, not its rates, the substance of the Petition belies that claim. For example, Petitioners ask the FCC to decide whether GTE's practice of rounding up is unjust, in violation of [Section] 201(b) of the Communications Act, "because . . . (ii) such charges result in the consumer paying for phantom services not received, and (iii) such charges result in unjust and arbitrary billing to the consumer (charging the same price for calls of different length is unreasonable)."

with such communication service, shall be just and reasonable."[6] Petitioners allege that the subject rate practices are not just and reasonable, and are therefore unlawful under Section 201(b). The subject rate plans and practices do not violate Section 201 of the Act. To the contrary, these rate plans simply constitute pricing alternatives chosen by a certain CMRS carrier operating in a competitive environment where alternative plans are available. Thus, the Commission should declare the rate plans not unlawful under Section 201(b).

The Commission already has explicitly approved the rounding up of rates to the next whole minute:

> [Rounding up] is still the most common billing practice for interexchange services, as well as for CMRS. The Commission has never questioned the lawfulness of this industry practice for the provision of CMRS, and rounded-up, whole minute billing has never been found by the Commission to be violative of Section 201(b) . . . . [T]hese rate practices are clearly among those which CMRS providers, consistent with Section 201(b) of the Act, have discretion to implement for their services.[7]

In addition, the Commission has concluded that mandating per second charging appeared "unlikely to benefit consumers" since the rates charged to the customer might ultimately remain unchanged, yet competition would be reduced because carriers could no longer differentiate by offering different

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[6] 47 U.S.C. § 201(b). Section 201 applies only to interstate communications, *see* 47 U.S.C. § 201, therefore the following discussion applies to the justness and reasonableness of charging in whole minute increments and for incoming calls solely with respect to interstate CMRS communications.

[7] *SBMS Order*, 14 F.C.C.R. at 19904. Although Petitioners attempt to distinguish the Commission's approval in the *SBMS Order* of rounding up from the type of rounding up described in their Petition, the two definitions of rounding up are nearly identical from an operational standpoint: (1) "charging for CMRS calls in whole-minute increments" (*SBMS Order,* 14 F.C.C.R. at 19903) and (2) "[c]harging cellular phone customers in whole minute increments, without fractions, and at all times such charges (i) are measured from the time the 'send' . . . button is pushed, (ii) include time for 'unconnected calls,' . . . and (iii) are 'rounded up' to the next minute" (Reply to Opposition to Petition at 3).

billing increments.[8] Thus, there is no basis on which to conclude that this practice is inherently unjust or unreasonable.

In determining whether the other challenged rate plans and practices are just and reasonable under Section 201(b), the Commission must ascertain whether they fall within a "zone of reasonableness."[9] Whether or not a rate plan or practice falls within this zone necessitates determining whether it "reflect[s] or emulate[s] competitive market operations."[10] Such a determination is "not dictated by reference to carriers' costs and earnings, but may take account of non-cost considerations."[11] Thus, for a rate plan to be unlawful in the highly-competitive CMRS context under Section 201(b) (*i.e.*, unjust and unreasonable), there must be a showing that "market conditions fail to produce rates that fall within a 'zone of reasonableness.'"[12] In this case, there has been and can be no such showing.

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[8] *See* Letter from Kathleen Levitz, Acting Chief, Common Carrier Bureau, to Donald L. Pevsner, Esq., at 1-2 (dated Dec. 2, 1993) ("Levitz Letter") ("We believe it is unlikely that the rule changes you seek will reduce consumer phone bills. If per-second billing were required, interstate long-distance carriers would almost certainly react by setting their per second rates at a level designed to recover the revenues that were generated by the previous rates.").

[9] *See, e.g., FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979); *AT&T v. FCC*, 836 F.2d 1386, 1390 (D.C. Cir. 1988).

[10] *Petition of Arizona Corporation Comm'n to Extend Rate Authority Over Rate and Entry Regulation of All Commercial Mobile Radio Services*, PR Docket No. 94-104, *Report and Order and Order on Reconsideration*, 10 F.C.C.R. 7824, 7826 (1995); *see Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, *Report and Order and Second Further Notice of Proposed Rulemaking*, 4 F.C.C.R. 2873, 2886, 2889-2900 (1989), *recon.*, 6 F.C.C.R. 665 (1991).

[11] *Petition of Arizona Corporation Comm'n,* 10 F.C.C.R. at 7826 (citations omitted); *see FERC v. Pennzoil Producing*, 439 U.S. at 517 (stating that the zone of reasonableness is not defined by a "rigidly . . . cost-based determination of rates, much less . . . one that bases each [carrier's] rates on its own costs") (citation omitted); *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1502-03 (D.C. Cir.), *cert. denied*, 469 U.S. 1034 (1984) (acknowledging agency authority to consider non-cost factors in establishing just and reasonable rates).

[12] *Petition of Arizona Corporation Comm'n*, 10 F.C.C.R. at 7826.

The Commission has recently found that the CMRS industry "continues to benefit from the effects of increased competition," with as many as seven competitors licensed to provide broadband CMRS in each geographic market throughout the United States.[13] Since the Commission issued its first report on competition in the CMRS industry in 1995, the CMRS market has undergone major changes that have resulted in "increased competition evidenced by lower prices to consumers and increased diversity of service offerings."[14] This increased competition has led to a growing number of rate and service options offered by CMRS carriers.[15] While many carriers charge on a per minute basis, others offer per-second billing, or flat-fee rates with various quantities of minutes (measured in various ways) included.[16]

The Commission has noted that an essential tenet of competing in the mobile marketplace is the ability to "provid[e] services with *different* features, functions, *cost*, and quality of service."[17] Given the expanding number of CMRS competitors and rates and services offered, if consumers are unhappy with a given rate computation, one or more competitors will respond to the demand for a different rate computation. This has already happened in the wireless industry, where Nextel now offers subminute billing increments and certain Cellular One markets do not begin billing for a dialed call until 30 seconds after the "send" button is pushed.[18]

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[13] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Fifth Report*, 2000 FCC LEXIS 4372, at pp. 4, 6 (Aug. 18, 2000) (*"Fifth Annual CMRS Competition Report"*).

[14] *Fifth Annual CMRS Competition Report*, at p. 4.

[15] *Fifth Annual CMRS Competition Report*, at p. 16.

[16] Southwestern Bell Mobile Systems, Inc., Petition for Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, FCC 99-365, at 5 (Nov. 12, 1997).

[17] *Second Annual CMRS Competition Report*, 12 F.C.C.R. at 11312 (emphasis added).

[18] *See* www.nextel.com/rates/rates.shtml, www.getcellone.com.

Measuring calls from the time the "send" button is pushed and including time for unanswered calls is common in the CMRS industry and has been long accepted by customers, indicating the reasonableness of such practices. Moreover, measuring calls in such a way is reasonable because each cellular call captures one of the limited number of radio channels available to a cellular carrier and cellular carriers incur costs to switch and transport calls from the time the call connects to the landline telephone network (*i.e.*, from the time the "send" button is pushed, regardless of whether the call is ultimately answered).[19] Accordingly, charging customers for this time clearly falls within the "zone of reasonableness" under Section 201(b) and should be declared not unlawful by the Commission.

II. STATE LAW CHALLENGES TO THE SUBJECT RATE PLANS ARE PREEMPTED UNDER SECTION 332(c)(3)

Contrary to Petitioners' assertion, no state may regulate the decision of a CMRS carrier to charge its customers for calls in whole minute increments, as measured from the time the "send" button is pushed, regardless of whether the call is answered, because states are preempted from regulating rates and charges under Section 332. Specifically, in 1993, Congress amended Section 332 of the Communications Act to provide that "no State . . . shall have any authority to regulate the . . . rates charged by any commercial mobile service."[20] The Commission has previously concluded that this provision expresses "an unambiguous congressional intent to foreclose state regulation in the first instance,"[21] and that this preemption extends to the elements of service to which the rates

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[19] GTE Opposition to Petition for Declaratory Ruling on Issues Contained in Count I of "White vs. GTE," at 8 (February 10, 2000) ("Opposition").

[20] 47 U.S.C. § 332(c)(3); *see* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, 6002 ("OBRA" or "Budget Act").

[21] *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Second Report and Order*, 9 F.C.C.R. 1411, 1504 (1994) ("*CMRS Second Report and Order*"), *recon. granted in part*, 10 F.C.C.R. 7824 (1995).

apply.[22] Further, the Commission has concluded that decisions regarding whether to charge customers in whole minute increments, and how to measure the length of customer calls, are directly related to the rate elements and the "rates charged" to customers.[23] Thus, states are preempted from regulating these decisions.[24]

In fact, in implementing OBRA, the Commission concluded that a state seeking to retain or initiate rate regulation of CMRS providers must "clear substantial hurdles" in demonstrating that regulation is warranted.[25] Specifically, a state must show that CMRS "market conditions . . . fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory."[26] Given that "there is a 'general preference that the CMRS industry be governed by the competitive forces of the marketplace, rather than by governmental regulation'"[27] and that "Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear-cut need,"[28] such a showing is, by design, a substantial one.

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22 *SBMS Order*, 14 F.C.C.R. at 19906-07. "[A] 'rate' has no significance without the element of service for which it applies. . . . [S]tates not only may not prescribe how much may be charged for these services, but also may not prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers."

23 *Id.*

24 Judicial challenges to such rate plans must also be barred by Section 332(c)(3) because "[i]t is undisputed that . . . judicial action constitutes a form of state regulation. Thus, . . . state court adjudications threaten the uniformity of regulation envisioned by a congressional scheme." *Comcast Cellular Telecomm. Litig.*, 949 F. Supp. 1193, 1201 n.2 (E.D. Pa 1996); *see Shelley v. Kramer*, 334 U.S. 1 (1948) (considering action taken by state courts to be the equivalent of state action for Fourteenth Amendment purposes).

25 *See CMRS Second Report and Order*, 9 F.C.C.R. at 1504.

26 47 U.S.C. § 332(c)(3)(A)(i).

27 *SBMS Order,* 14 F.C.C.R. at 19902 (citation omitted).

28 *Petition of Arizona Corporation Comm'n*, 10 F.C.C.R. at 7827.

No such showing has been or can be made here. As shown above in Section I, the rate practices at issue here are just and reasonable, and therefore the states cannot avail themselves of the argument that the market has failed. As the legislative history of OBRA makes plain, Congress intended to establish a *national* regulatory policy for CMRS,[29] not a policy that is "balkanized state-by-state."[30] Further, disparate state regulation would significantly increase CMRS providers' operating costs, thereby discouraging the entry of new wireless providers, contrary to the goals of the 1993 Budget Act. Accordingly, the Commission should declare that any judicial action or state regulation regarding the subject rate plans and practices is explicitly preempted under the Act.

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[29] *See* H.R. Conf. Rep. No. 103-213, at 480-81 (1993).

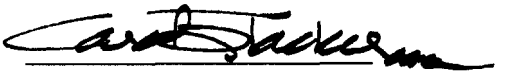
[30] *Petition of Arizona Corporation Comm'n*, 10 F.C.C.R. at 7828; *see also* 47 U.S.C. § 271(b)(3) and (g) (exempting incidental interlata services from the Section 271 clearance requirement and defining CMRS as an incidental service offering).

CONCLUSION

For the foregoing reasons, Alloy urges the Commission to issue a ruling that the challenged rate practices are not unreasonable or unlawful, and that state regulation of such practices is preempted by federal law.

Respectfully submitted,

ALLOY LLC

By: 

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